PETITION.

Mary Lim (Miss) for the petitioner.

A. W. Ghows (Senior Crown Counsel) for the Crown.

Rose C.J.: In this case a Mandatory Order was made against the petitioner as long ago as the 7th of October, 1960. The Order was issued on the 22nd of November, 1960 and leniency was shown in that in the Order the petitioner was given a period of 8 days after the end of the year, that is, until the 8th of January, 1961 to comply with the Order. Today is the 25th of October, 1961 and I am asked to exercise my powers in revision under section 311 of the Criminal Procedure Code. The Order was, of course, one that is eminently appealable and in the normal course of events that would be and should be the remedy that should be sought. It seems to me, as learned Crown Counsel says, that it is almost an abuse of the process of the Court for me to be invited to hear this matter in revision now. It is far too late.

In these questions of Mandatory Orders of the kind under consideration, the points involved are simple, and if the person against whom the Order is made does not like it, he can appeal. I am satisfied that the petitioner understood full well that he could have appealed. If a petitioner does not appeal and waits for 9, 10 or 11 months, as the case may be, and then moves in revision, the inference to me is irresistible that mere delay is sought and no other purpose.

In the circumstances it would, in my opinion, be quite wrong for me to stretch my jurisdiction under section 311 of the Criminal Procedure Code to cover a case such as the present. I therefore am unable to entertain the petition, and it is refused.

Petition refused.

Solicitor: *L. Rayner.*

CHAN WING & SONS REALTY CO. LTD. v. THE ASIA INSURANCE CO. LTD.

[O.C.J. (Ong J.) November 6, 1961]

[K.L. — Civil Suit No. 136 of 1959]

Nuisance — Vibration by piling operations — Structural damage — Old building — Measure of damages — Difference between money value of property before and after damage.

In carrying out piling operations the defendants caused serious structural damage to the plaintiffs' adjacent property. The plaintiffs sued for damages a sum of $50,000 for rebuilding and replacement of their premises, and an additional sum of $720 for loss of rent for six months.

Held: (1) setting up vibration by piling operations which cause injury to another's property amounts to an actionable nuisance and accordingly the plaintiffs had a good cause of action in nuisance;

(2) the true measure of damages in such a case is not the cost of reinstatement or rebuilding, but the difference between the money value of the property before and after the damage. In the circumstances the damages should be assessed at $10,000, in addition to the sum of $720 for loss of rent.

Cases referred to:—

(1) *Hoare & Co.* v. *McAlpine* [1923] 1 Ch. 167, 176.

(2) *Moss* v. *Christchurch Rural District Council* [1925] 2 K.B. 750.

ACTION.

R. H. V. Rintoul for the plaintiffs.

A. L. Hills for the defendants.

Cur. Adv. Vult.

Ong J.: In this action the plaintiffs claim compensation for loss and damage suffered by them in the course of preparation of a site on the defendants' land for a large building which resulted in serious structural damage to the plaintiffs' premises.

The plaintiffs are the owners of Lots 105 and 85, section 49, in the Town of Kuala Lumpur, on which stand buildings of the shop-house type, including premises No. 49 Klyne Street. The defendants own the adjacent Lots 104 and 84. Their contractors started work on the site in May 1957. In preparing the foundation percussion piling was carried out, followed about six months later by excavation for constructing the basement. Damage to No. 49 Klyne Street from these operations was in fact anticipated by the defendants' consulting engineers and architects, as shown by a letter of May 9, 1957 from the defendants' solicitors to Messrs. Au-Yong Brothers, the tenants, who are the plaintiffs' solicitors. The defendants had also set aside a sum of $4,000 for making good the damage expected to follow. These anticipations were justified within a few days after piling operations started on May 27, 1957. On June 6, Messrs. Au-Yong Brothers complained of the severe vibration causing cracks in the walls of their premises and in a reply of the following day it was admitted by the defendants' solicitors that the piling work had been technically faulty. In fact no shoring had been carried out before piling began. The continuation of further piling caused increasingly serious damage to the fabric of the premises and were the subject of further complaints by the tenants in their letters of June 11, 14 and 18. Large cracks appeared in the walls and cement floor, the back wall was drawing away from the roof timber, doors and windows got out of alignment and resisted efforts to shut them, the staircase became detached from the adjoining wall and the foundations appeared to have been seriously shaken. The state of the premises rapidly deteriorated to such an extent that on June 22 a nuisance notice, under section 246 of the Municipal Ordinance, was served on the occupiers by the Municipal Architect requiring that adequate action be taken to ensure the stability of the premises. Only simple precautionary measures in the nature of first-aid were taken against the danger of the house collapsing. A second nuisance notice followed on December 6, 1957. Detailed reports

of the structural damage suffered by the house have been submitted by Mr. J. B. Ross and Mr. Raymond Wong, consulting engineers, in Exhibits P3 and P7 and by Mr. James Lee, architect, in Ex.P.10. I do not think it necessary here to refer to the details. Photographs showing the extent of the damage have also been put in evidence, and the general impression they conveyed has been confirmed upon my inspection of the premises at the commencement of the trial. I am satisfied and find as a fact that the house has been reduced into a shockingly deplorable condition. To use the words of Mr. Philip Chow, consulting engineer, who gave evidence for the defendants, it actually requires drastic renovation or replacement.

The building is of considerable age and appears to have been erected at the turn of the century. But undamaged, it may well have lasted another twenty years. Its present state of dilapidation, however, is such that I think satisfactory restoration requires repairs to such an extent as to be comparable to putting new wine into old bottles, an operation which I do not consider fair or reasonable.

In their statement of claim the plaintiffs attribute the damage to the excavation and piling operations. They claim as damages a sum of $50,000 for rebuilding and replacement of their premises, and an additional $720 for loss of rent for six months. The defendants, however, deny liability in toto. They do so on three grounds. First, they say that the building is of great age and was in a precarious structural condition at all material times and that any damage it sustained resulted from its age and inherent structural weakness. Secondly, they say that any disturbance of the building or its foundations was due to subsidence of the land on which it stands, and that such subsidence was due to underground water flowing away, for which they were not in law responsible. Thirdly, they say that the entire building operations were carried out by an independent contractor in an efficient and workmanlike manner without any negligence, and that in any event they were not liable for damage resulting from the operations of such an independent contractor.

Because the damage can definitely be traced to extraneous causes, of which vibration was the most outstanding, it is idle for the defendants to pretend that the age of the house or the structural weakness of a building erected in former days has any relevance. The observations of Astbury J. are specially apposite when he said in his judgment in *Hoare & Co.* v. *McAlpine* [1]:

> "I see no justification for its being physically shaken in its declining years to a premature and untimely end by an adventurous and powerful neighbour.....If the defendants' contentions of law were really apposite I should find it difficult to answer the query: 'when does an old building lose its ordinary right of protection against destruction?' The prospect of all old buildings in London and elsewhere having, if they are to be rendered immune and permitted to continue their existence, to be put into a condition capable of resisting not only all ordinary but also all extraordinary forces that may be let loose to operate against them, seems to me to be alarming."

In that case vibration from piling was the cause of serious structural damage. In the instant case there are abundant admissions by the defendants of the same cause in their letters. In addition, there is overwhelming evidence of the effects of vibration on the building down to its very foundation. The nuisance notice by the Municipality was issued less than a month after commencement of piling operations and five months before the excavations could have begun to release underground water so as to cause subsidence by withdrawal of support. Therefore, upon consideration of the whole of the evidence, I am satisfied and find as a fact that all the serious structural damage had resulted before any withdrawal of support by underground water could have started even to take effect. True there was some aggravation of the damage due to subsidence, but the subsidence itself cannot be attributed with reasonable certainty to the outflow of water rather than to compacting of the earth by piling, and I am not going to indulge in speculation on a subject on which even expert opinion has shown a considerable divergence. The defendants have not discharged the onus of proving what they assert to be the truth. I would further observe that, although the defendants' architect and consulting engineer had been on the site to conduct their own investigations soon after receipt of complaints of the damage to No. 49 Klyne Street, there was no suggestion for over nine months that such damage was not solely due to vibration set up by the piling operations. The withdrawal of support by underground water was raised for the first time in the letter of March 13, 1958 from the defendants' solicitors, by which date the excavation was all but over. It is pertinent to ask why it had not occurred to the defendants' advisers to assert for so long the reason which they now give to explain the subsidence of the plaintiffs' land. It is therefore only reasonable for me to conclude that this ground of defence was raised as an afterthought. If it was something that had not occurred to the minds of the defendants' architect and consulting engineers until near-completion of the work on the basement, then it seems to me quite clear that when underground water was pumped out no measures could have been taken against pumping out silt because they had not even thought of, much less anticipated, the consequences. The evidence of the defendants' architect, engaged on a multi-million dollar building, that a mere bagatelle been set aside to compensate for all damage to the adjoining shop-house reveals an attitude of mind which smacks strongly of contumely towards the neighbour. The damage having resulted substantially from the piling operations, my views may best be expressed by a simple analogy. If I wrongfully crack my neighbour's pot so that it becomes unserviceable, am I exonerated if his own or some stray dog smashes it the next moment?

Setting up vibration by piling operations which cause injury to another's property amounts to an actionable nuisance. The principle is no longer open to question on the authorities, and I have so held recently in Kuala Lumpur Civil Suit No. 351 of 1958, *Chan Teck Chye & Another* v. *Yeow Kim Pong Realty Ltd.* As the plaintiffs have a good cause of action in nuisance, it is unnecessary to consider whether the defendants are also liable on other grounds. Such questions can only be of academic interest. I pause only for a moment to mention that the third ground of defence pleaded must be taken to have been abandoned at the trial because there is not a scrap of evidence regarding the works being executed by an independent contractor.

The question that now remains is as to the quantum of damages. Counsel for the defendants cited *Moss* v. *Christchurch Rural District Council* [2] in which Salter J. laid down that the true measure of damages in a case where the building was a total loss is not the cost of reinstatement or rebuilding, but the difference between the money value of the property before and after the damage. No evidence, however, as to the value before and after has been given by either party. There being no material on which any assessment can be made on that basis, any opinion *in vacuo* which I may form cannot provide a substitute in default of evidence. It is, of course, manifest that the plaintiffs are not entitled to have a new house at the defendants' cost in place of the old. On the other hand, it is equally clear that the defendants should not be permitted to dictate in what manner and to what extent restoration or repair should be executed. Nor, I think, should I assess the value of the premises before and after damage as if it were a mere shell of a house, severed from the land, consisting of bricks, mortar and timber. A useful yardstick, in the circumstances, would appear to be the repair costs given by the experts. In round figures such costs have been stated by the plaintiffs' witness to be $16,000 and by the defendants' witness to be $4,000. The latter agreed that execution of the works required by the plaintiffs would cost almost $10,000. These requirements appear to me quite reasonable. The contumelious attitude of the defendants and their architect towards the plaintiffs, in general, and, as an instance, the reckless manner in which the roof of No. 49 Klyne Street was being damaged by building material dropped from a height, in particular, cannot be entirely overlooked. If such material could effectively be prevented from falling on the heads of pedestrians passing along the street below, damage to the plaintiffs' roof could as easily have been avoided. This is a simple but striking illustration of the defendants' concept of the duty they owe to their neighbour. Their architects' own pre-estimate of $4,000, to which he adhered, sprang from that same concept, and I am satisfied that this amount is entirely inadequate. In all the circumstances, I would assess the damages at $10,000. There was no dispute as to the sum of $720 claimed for loss of rent, and I would award that sum in addition. I accordingly give judgment for the plaintiffs for the total sum of $10,720 and costs.

Judgment for the plaintiff.

Solicitors: *Shearn Delamore & Co.; Donaldson & Burkinshaw.*

SIM AH OH v. PUBLIC PROSECUTOR

[A. Cr. J. (Adams J.) November 12, 1961]

[Muar — Criminal Appeal No. 65 of 1961]

Gaming — Assisting in public lottery — Common Gaming Houses Ordinance, 1953, s.4(1)(c).

Evidence — Expert evidence on exhibits — Testing of expert evidence — Date on exhibits inconsistent with date of offence.

Where a prosecution expert deposes on documents to say these are documents for the carrying on of a public lottery, in this case a 10,000 character lottery, the expert must state his reasons for his opinion that the exhibits relate to betting and staking in the character lottery. The evidence of the expert must be tested like any other evidence against the facts upon which he is deposing. *Public Prosecutor* v. *Lee Ee Teong* [1] and *Ang Chwee Keong* v. *R.* [3] followed. *Choo See Kean* v. *Public Prosecutor* [4] explained.

Where the exhibits carry a date antecedent to the date of the offence in the charge, this only means that the element of chance has been decided. If the distribution of the prize money has not taken place, a lottery is still in progress and will continue to remain in progress until the distribution of the money has been completed.

Cases referred to:—

(1) *Public Prosecutor* v. *Lee Ee Teong* [1953] M.L.J. 244.

(2) *Sim Ah Song & Anor.* v. *R.* [1951] M.L.J. 150.

(3) *Ang Chwee Keong* v. *R.* [1955] M.L.J. 36.

(4) *Choo See Kean & Ors.* v. *Public Prosecutor* [1959] M.L.J. 213.

(5) *Kang Yeow Hooi & Ors.* v. *Public Prosecutor* [1954] M.L.J. 233, C.A.

(6) *Chua Chong Chut* v. *Public Prosecutor* [1954] M.L.J. xxxv.

(7) *Public Prosecutor* v. *Neoh Boon Cheow* [1960] M.L.J. 31, C.A.

CRIMINAL APPEAL.

A. J. Braga for the appellant.

Hamzah bin Dato Abu Samah (Deputy Public Prosecutor) for the respondent.

Adams J. (delivering oral judgment): The accused was charged before the learned President sitting as Magistrate, Batu Pahat, with assisting in the carrying on of a public lottery, namely 10,000 character lottery, an offence punishable under section 4(1)(c) of the Common Gaming Houses Ordinance No. 26 of 1953. He was convicted and fined $3,000 or 8 months' imprisonment.

The evidence was not seriously disputed. The accused was found coming out of the premises raided with the bundle of documents which were produced in Court on him. The learned Magistrate did not accept his explanation in